SUPREME COURT, U. S.

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In The

Supreme Court of the United States

No. 1218

PHILIP C. ANDERSON, et al., APPELLANTS

V.

NORBERT TIEMANN, et al., APPELLEES

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

MOTION TO AFFIRM

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COME NOW the appellees and move this Court to affirm the judgment of the Supreme Court of Nebraska, sought to be reviewed on appeal herein, on the ground that it is manifest from the opinion of the Nebraska Court that the federal questions there considered were carefully and correctly decided and there is no indication of need for further argument.

ARGUMENT IN SUPPORT OF MOTION

The Jurisdictional Statement filed with this Court is divided into three arguments. We respond to those arguments in the order in which they are presented.

1. The appellants attack the "food sales tax credit", Section 15(3)(a), L.B. 377, Laws of Nebraska, 1967, attached to the Jurisdictional Statement as Exhibit "B". It is contended that this provision is discriminatory against non-residents in violation of Article IV, Section 2, and the Fourteenth Amendment, Section 1, of the Federal Constitution. Appellants' arguments are based entirely upon cases involving state income tax laws where those laws provided for exemptions or benefits to residents solely on the basis of residence.

First, the appellants have not carefully read the Nebraska decision. The court there made clear that as it construes L.B. 377, the act itself establishes that the food sales tax credit is intended as a basic sales tax provision rather than an income tax provision. It points out therein that the $7.00 per qualified individual resident is not only allowed as a credit against the income tax payable, but is also allowed as a refund to the extent that the sales tax credit exceeds the income tax payable by the resident individual for the taxable year. It also provides that a resident individual shall be conclusively presumed to have paid "retail sales and use taxes imposed by this state equal to the maximum food sales tax credit allowable".

The court points out that it was the legislative policy to permit the credit or refund to be taken or claimed on the individual's state income tax return insofar as income tax returns may be required. For remaining cases, the refund is to be claimed on other forms. The court then points to the sound administrative reasons in support of the legislative policy decision, noting the inherent difficulties in administration and collection of taxes where certain foods are taxed and others are not.

The Nebraska court pointed out further that it would seem reasonable for the Legislature to determine that generally a state sales tax on food for personal use will be paid almost universally by residents of the state, while purchases of such foods in the state by non-residents are ordinarily minimal.

Thus, considered basically as a sales tax, it is perfectly logical and reasonable that the resident receive such credit or refund as the Legislature deems appropriate to take the place of foods not exempted in the sales tax law from the general classification of foods taxed. The Nebraska court draws attention to the difficulties of picking and choosing as to foods to be exempted. Those persons who are unable to claim their refund on the income tax returns are specifically permitted to do so by filing of the proper form.

It is certainly proper for the state's highest court to interpret its own tax legislation with respect to the nature of a particular tax. The cases of *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 79 Sup. Ct. 437, 3 L. ed. 2d 480, and *Toomer* v. *Witsell*, 334 U.S. 385, 68 Sup. Ct. 1156, 92 L. ed. 1460, would seem to dispose of the question of the power of the state to classify in the manner in which it did in this instance since there is a logical and substantial reason for classification.

Take it one step further. If non-residents were to be given the benefit of a credit or refund under the sales tax on food, residents of surrounding states having no sales tax on food, or upon which there is a lesser tax upon such items, would receive a right in discrimination of the residents of the State of Nebraska, since they would be paying no sales tax or a lesser sales tax in

their own state and also receiving a credit on their income tax return against taxes on income earned from sources within Nebraska, or would be entitled to a refund from Nebraska. The right to protection against discrimination does not give the non-resident a right to gain favored treatment. *Shaffer* v. *Carter*, 252 U.S. 37, 40 Sup. Ct. 221, 64 L. ed. 445.

It was stated in *Madden* v. *Kentucky*, 309 U.S. 83, 60 Sup. Ct. 406, 84 L. ed. 590 that it is clear that "in taxation, even more than in other fields, legislatures possess the greatest freedom in the classification." This Court went on to say that the presumption in favor of the constitutionality of a state tax law can be overcome only by the most explicit demonstration that the classification adopted by the Legislature is a hostile and oppressive discrimination against particular persons and classes.

While the Nebraska court placed the nature of the "food sales tax credit" as a sales tax; it said that even if it assumed that such credit is a part of the income tax rather than the sales tax, the result should be no different. It pointed out that the "food sales tax credit" should logically be treated as a personal expense deduction, as opposed to a business expense deduction. The allowance of such credits or deductions constitute an exception to the general principle that personal living expenses are not allowed as deductions for income tax purposes. This philosophy follows that stated in *Goodwin* v. *State Tax Commissioner*, 286 App. Div. 694, 146 N.Y.S.2d 172 (1955), and followed in *Berry* v. *State Tax Commission*, 241 Ore. 580, 397 P.2d 780, 399 P.2d 164 (1964). Rather than supporting appellants' argument, the case of *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S.

60, 40 Sup. Ct. 228, 64 L. ed. 460 (1920), is the cited supporting authority for the holdings in the above stated decisions. That case considered the question of whether it was permissible within the constitutional provisions hereinbefore mentioned for a state to provide that its residents may claim deductions for certain personal living expenses while denying those deductions to non-residents earning income within the state. This is also the question that was considered in *Shaffer* v. *Carter*, *supra*. In both situations non-residents were permitted the same business deductions with respect to income from within the state. This Court upheld the classification. This Court in *Travis* v. *Yale & Towne Mfg. Co.*, *supra*, next considered a provision which purported to grant resident taxpayers an exemption of $1,000.00 in the case of a single person, $2,000.00 in the case of a married person, and $200.00 for each dependent. Non-resident taxpayers were not allowed any exemption. This Court held this to be unconstitutional as an unreasonable discrimination between residents and non-residents, based on no other reason than that non-residents were non-residents. The appellants rely on this second part of the *Travis* holding as analogous to the credit here. It is the first part of the holding which would be pertinent if the credit here discussed was a part of the income tax structure of Nebraska. In *State* v. *Ashby*, 73 N.M. 267, 387 P.2d 588 (1963), cited by the appellants, the situation was the same as in the second part of *Travis*. There was involved the same attempt to give a monetary credit against the income tax to residents while denying it to non-residents. In *Borden* v. *Selden*, 146 N. W. 306 (1966) there was involved an Agricultural Land Tax Credit extended to residential operators of agricultural lands in the State of Iowa as against non-residential operators. This again

was a tax based solely upon the consideration of residence and was held unconstitutional under the doctrine of the *Travis* case. The same comment may be made of the other cases cited by the appellants, both in this Jurisdictional Statement and the many other cases they have previously cited in the state courts for this same proposition.

The New York Court in *Goodwin* faced the same type of argument. It there said:

> "The petitioner's principle argument is that, by analogy to the decision of the Supreme Court in the case of Travis v. Yale & Towne Mfg. Co., 252 U.S. 260, 40 Sup. Ct. 228, 64 L. ed. 460, supra, holding the distinction between residents and non-residents with respect to exemptions to be invalid, the distinction as to deductions must also be held invalid. The analogy does not seem to us to be a sound one. Exemptions are allowed as a flat amount, without "regard to the making of expenditures of any kind by the taxpayer. A flat exemption, in connection with the graduated income tax, has a direct effect upon the rate of taxation. It excludes a part of the taxpayer's income from the tax base and it lowers the tax bracket into which his remaining income falls. Obviously it would be unconstitutional for New York State arbitrarily to tax the New York income of a non-resident at a higher rate than that applied to the income of residents. This is the substance of the holding of the Travis case.*"

2. Appellants' second argument is based upon the premise that the Nebraska Income Tax Act is an abandonment by it of its sovereignty in the legislative field. We think this point well answered in the Nebraska decision wherein it is pointed out that the constitutional amendment in Nebraska does not require, but only

authorizes, the Legislature to base a state income tax law upon the laws of the United States.

The Nebraska court pointed out that it permits the Legislature to use all, part or none of the laws of the United States as it may determine from time to time appropriate insofar as it may be lawful and practicable to do so, and that it does not preclude it from repealing its own present enactment or from adopting a completely different system. The Legislature retains the complete power to make such decisions.

While the appellants speak of it being in violation of the Federal Constitution for a state to adopt future federal laws, they must necessarily be referring to the principle referred to in *Carter* v. *Carter Coal Company*, 298 U.S. 238, 56 Sup. Ct. 855, 80 L. ed. 1160, wherein it was said that state powers can neither be appropriated on the one hand nor abdicated on the other. We merely point out that there cannot be said to be an abdication of the state legislative power when it, of its own choice, and with full control of the future of such choice, chooses to adopt federal laws as they exist or as they may be amended.

3. Appellants, by arguing that L.B. 377 in some manner violates the requirement of a "Republican" form of government, apparently refer to "representative" form of government. We find nothing in the decisions cited in the Jurisdictional Statement which in any manner suggests that the adoption of L.B. 377 has the effect of destroying the representative form of government in Nebraska. The cases cited by appellants and the arguments made by them clearly ignore that in the Nebraska situation we are dealing with an

amendment to the State Constitution which permits the Legislature to undertake the type of legislation embodied in L.B. 377. While it has been contended that the Federal Constitution prohibits the states from amending their constitutions to permit enactment of legislation existing and future federal laws, no citation of substance has ever been forthcoming. Without an abdication of sovereignty being involved, we fail to see how there can be Federal Constitutional objection.

CONCLUSION

It was incumbent upon the appellants to state a substantial reason for this Court's noting probably jurisdiction of this appeal. We respectfully submit that the decision of the Nebraska Supreme Court is so patently in line with the constitutional philosophy and the decisions of this Court that further argument in the case will serve no useful purpose.

Respectfully submitted,

NORBERT TIEMANN, *et al.*,
Appellees

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

ANDERSON ET AL. *v.* TIEMANN ET AL.

APPEAL FROM THE SUPREME COURT OF NEBRASKA.

No. 1218. Decided April 22, 1968.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.